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No. 90-638

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN BABIGIAN,

Petitioner,

– against –

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT BRIEF IN OPPOSITION FOR RESPONDENTS

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JOHN BONOMI, ELEANOR PIEL, STANLEY ARKIN, WILLIAM HELLERSTEIN, ROBERT MCGUIRE, PATRICK WALL, MARTIN FOGELMAN, POWELL PIERPOINT, NINA CAMERON, ADLAI HARDIN, JR., JOSEPH W. BELLACOSA, RICHARD W. WALLACH, STEPHEN KAYE, JEFFREY K. BRINCK, ALVIN SCHULMAN, SETH ROSNER, JONATHAN H. CHURCHILL, WILLIAM J. MANNING, MEREDITH M. BROWN, ROBERT D. SACK, FREDERICK C. CARVER

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QUESTION PRESENTED[1]

Whether the New York statute of limitations bars petitioner's claims which accrued in 1975 where the complaint demonstrates that the limitations period cannot be tolled and where petitioner admits that he intentionally waited thirteen years before filing a complaint in the federal court.

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[1] Respondents note that although petitioner lists some five questions for presentation to this Court, the lower courts found one basic issue – the application of the statute of limitations – to control the disposition of this lawsuit and mandate dismissal of the complaint. Petitioner does not assert the statute of limitations as one of the questions presented.

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Respondents Association of the Bar of the City of New York (hereafter referred to as the "Association of the Bar"), John Bonomi ("Bonomi"), former General Counsel to the Committee on Grievances of the Association of the Bar of the City of New York (Comp. ¶ 8, JA-12),[2] Robert McGuire, Patrick Wall, Adlai Hardin, Jr., Joseph W. Bellacosa, Richard W. Wallach, Stephen Kaye, Jeffrey K. Brinck, Alvin Schulman, Seth Rosner, Jonathan H. Churchill, William J. Manning, Meredith M. Brown, Robert D. Sack and Frederick C. Carver, former members of the Committee on Professional Ethics of the Association of the Bar (hereafter referred to as the "Ethics Committee") (Comp. ¶ 136, JA-140-41),

[2] References designated "JA-__" refer to the Joint Appendix of the parties filed before the Second Circuit Court of Appeals and cited throughout Babigian's petition for a writ of certiorari.

and Stanley Arkin, William Hellerstein, Powell Pierpoint, Martin Fogelman, Robert McGuire, Eleanor Piel, Patrick Wall and Nina Cameron, former members of the Committee on Grievances of the Association of the Bar (hereafter referred to as the "Grievance Committee") (Comp. ¶ 140, JA-142-43),[3] submit this brief in support of their request that this Court deny the petition of John Babigian ("Petitioner" or "Babigian") for a writ of certiorari to review the summary order of the United States Court of Appeals for the Second Circuit entered on July 19, 1990, which affirmed the dismissal of Petitioner's complaint by the United States District Court for the Southern District of New York.

INTRODUCTION

Babigian's petition for a writ of certiorari presents no special or important reason for this Court to review the decision of the United States Court of Appeals for the Second Circuit affirming dismissal of his complaint. The Second Circuit affirmed the district court's application of settled law governing application of the New York state statute of limitations to Petitioner's claims brought under 42 U.S.C. § 1983 and state law. (A-4-5).[4] The dismissal is consistent with the decisions of this Court in *Owens v. Okure*, 109 S. Ct. 573 (1989) and *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), applying New York's three year statute of limitations to Section 1983 actions brought in federal court. There is no conflict among the circuits on the issue here presented. Petitioner's 137 page complaint details that Petitioner knew of his alleged injuries and the parties involved when his causes of action accrued in 1975. In addition, Babigian specifically admits that he intentionally waited to take any action on these matters for another eleven years, and therefore did not file his complaint until 1988, a total of 13 years after the claims arose. Accordingly, as the lower courts found, under applicable state law there was no tolling of the statute of limitations. Since this Court routinely defers to the decisions of the

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[3] All of the above named Respondents are hereafter collectively referred to as the "Bar Association Defendants."

[4] References designated "A-__" refer to the Appendix submitted with Babigian's petition for a writ of certiorari.

lower federal courts on state law issues such as tolling of the state period of limitations, this case is clearly not worthy of review by this Court.

STATEMENT OF THE CASE

The complaint seeks damages and declaratory and injunctive relief under 42 U.S.C. § 1983, and alleged state common law and statutory violations. Babigian's claims against the Bar Association Defendants are all based on events surrounding the issuance of an admonitory letter to Petitioner on November 7, 1973 (the "Admonitory Letter") which alleged improprieties by Attorneys Research Inc. ("Research Inc.") (Comp. ¶ 34, JA-33), a corporation organized by Petitioner to provide legal research to attorneys in all jurisdictions (Comp. ¶ 4, JA-8), and on a subsequent disciplinary hearing (the "Grievance Committee Hearing") conducted by the Grievance Committee at Babigian's request (Comp. ¶ 53, JA-72; ¶ 55, JA-76; ¶¶ 83, 84, JA-102; ¶ 98, JA-115; ¶ 107, JA-122), which was terminated on May 16, 1975 with no further action taken against the Petitioner. (Comp. ¶ 118, JA-135-36). Indeed, as found by the lower courts, aside from the Admonitory Letter no action was ever taken against Petitioner. (A-16-17).

The gravamen of Babigian's Section 1983 claim is that the Admonitory Letter improperly disciplined him for constitutionally protected advertising and that he was denied due process during the subsequent Grievance Committee Hearing, which was held to determine (1) whether further disciplinary action should be taken against him for his refusal to provide further information and (2) whether a further hearing should be held on Babigian's request to appeal the Admonitory Letter. (Comp. ¶ 74, JA-95-99; ¶ 106, JA-122).

The complaint makes clear that Babigian timely received the Admonitory Letter (Comp. ¶ 34, JA-33-35), attended the Grievance Committee Hearing (Comp. ¶ 84, JA-102; ¶ 86, JA-104-05; ¶ 109, JA-123) and, prior to the conclusion of the hearings, was furnished with information identifying all sources of letters of complaint which had contributed to the issuance of the Admonitory Letter and commencement of the Grievance Committee Hearing. (A-23-24) (Comp. ¶ 34, JA-33-35; ¶ 111,

JA-123). The district court therefore held that "plaintiff's section 1983 claim accrued at the latest on May 16, 1975 when the Grievance Committee advised plaintiff that it was closing its file on the matter." (A-21).

Although Babigian argued before the lower courts that the statute of limitations should be tolled because it was not until 1986 that he was permitted to examine his disciplinary file which contained letters and memoranda he allegedly had not seen until that time, his complaint details that in 1975, during the period in which the Grievance Committee Hearing was being conducted, he filed a proceeding in federal court to enjoin the Grievance Committee Hearing in which he charged Respondent Bonomi with committing bad faith actions in concert with others. (Comp. ¶ 57, JA-80; ¶ 82, JA-101-02; ¶ 105, JA-122). Babigian's complaint in the instant case actually quotes from the affidavit which he filed in support of his 1975 federal injunction action. (Comp. ¶ 57, JA-80; ¶ 82, JA-101-02). The complaint also admits that in the course of litigating his 1975 federal action, Babigian received the initial complaint letters sent by the Florida Bar. These letters specifically put Babigian on notice that the Florida Bar Defendants[5] together with Bonomi had played a role in commencement of the Grievance Committee Hearings. (Comp. ¶ 111, JA-123). Similarly, Babigian admitted in papers filed before the district court that he intentionally waited eleven years for Bonomi to leave office before he asked to inspect his file pursuant to New York Judiciary Law § 90(10) (McKinney 1983). (JA-227-28).

On this record the district court properly held that Petitioner "knew the basic facts necessary to institute his claim" in 1975 and "did not act with due diligence in seeking to obtain the documents in his disciplinary file." (A-25-26). Babigian's complaint was not filed until 1988. The statute of limitations applicable to Petitioner's Section 1983 and state law claims was not tolled, and because the running of the statute of limitations was apparent from the face of the complaint, the district court properly utilized Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss this complaint in its entirety.

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[5] "Florida Bar Defendants" refers to respondents herein the Florida Bar, Norman Faulkner and E. Earle Zehmer, members of the Florida Bar.

REASONS FOR DENYING THE WRIT

DISMISSAL OF PETITIONER'S SECTION 1983 AND STATE LAW CLAIMS ON STATUTE OF LIMITATIONS GROUNDS DOES NOT RAISE ANY IMPORTANT FEDERAL QUESTIONS

The instant petition falls far below the threshold requirements for a grant of a writ of certiorari and does not warrant consideration by this Court. Although Petitioner has attempted to frame his questions presented in a manner to suggest that this case raises issues of due process, the fact remains, as the lower courts found, that the only issue in the instant litigation is whether Petitioner, who "did not institute the instant action until almost thirteen years after his cause of action accrued" (A-21), is time barred from asserting these Section 1983 and state law claims at this excessively late date.

This issue is neither a "question[] of importance which . . . is in the public interest to have decided by this Court," *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923), nor a case involving "a real and embarrassing conflict of opinion and authority between the circuit courts of appeal," *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), and accordingly does not merit review by this Court. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955); *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1950); Sup. Ct. R. 10.1. "[Certiorari] jurisdiction [is] not [to be] conferred . . . merely to give the defeated party in the Court of Appeals another hearing." *Magnum*, 262 U.S. at 163.

Both lower courts in this instance applied the long established rule for accrual of Section 1983 claims, *i.e.*, that such claims accrue and the period of limitations begins to run when a " 'plaintiff knows or has reason to know of the injury which is the basis of [his] action,' " *Watts v. Graves*, 720 F.2d 1416, 1423 (5th Cir. 1983) (quoting *United States v. Kubrick*, 444 U.S. 111, 122 (1979)); *Pauk v. Board of Trustees*, 654 F.2d 856, 859 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), and both courts

properly found from the allegations of Babigian's complaint discussed above, that Babigian had full knowledge in 1975 of all necessary facts which form the basis of the purported constitutional and state law injuries here alleged. (A-4-5; A-21).

Petitioner's attempt to evade the obvious statute of limitations bar under a tolling theory is unavailing. Questions of tolling in Section 1983 actions, like the limitations period, are governed by state law, *Wilson v. Garcia*, 471 U.S. 261, 269 (1985); *accord Board of Regents v. Tomanio*, 446 U.S. at 486, and absent some reason which would make their application inconsistent with the policies of deterrence and compensation underlying Section 1983 claims, state tolling rules are "binding rules of law" in Section 1983 actions. *Id.* at 484; *Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1978). Mindful of the broad sweep required in assessing the allegations of a complaint under Rule 12(b)(6), both lower courts here found that the facts which Babigian himself set forth in his complaint foreclosed any recognized legal basis for tolling the limitations period under New York law. (A-4-5; A-23-24).[6]

New York's tolling rules present no conflict with federal interests and are consistent with the policies of deterrence and compensation underlying Section 1983 actions. Indeed, this Court has previously noted that "no federal policy – deterrence, compensation, uniformity, or federalism – [is] offended by the application of state tolling rules." *Chardon v. Fumero Soto*, 462 U.S. 650, 657 (1983). New York's tolling rules with respect to fraudulent concealment are consistent with federal policies as they merely require plaintiffs to commence their Section 1983 actions within three years of the time they know of their injury

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[6] These findings are consistent with New York law. *General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 127-29, 219 N.E.2d 169, 170-71, 272 N.Y.S.2d 337, 339-40 (1966); *Jordan v. Ford Motor Co.*, 73 A.D.2d 422, 424, 426 N.Y.S.2d 359, 360-61 (4th Dep't 1980); *Erbe v. Lincoln Rochester Trust Co.*, 13 A.D.2d 211, 213-14, 214 N.Y.S.2d 849, 852-53 (4th Dep't 1961), *appeal dismissed*, 11 N.Y.2d 754, 181 N.E.2d 629, 226 N.Y.S.2d 692 (1962); *see also Augstein v. Levey*, 3 A.D.2d 595, 598, 162 N.Y.S.2d 269, 273 (1st Dep't 1957) ("[e]stoppel . . . may not be grounded on the later discovery of evidentiary details confirmatory of the basic facts"), *aff'd*, 4 N.Y.2d 791, 149 N.E.2.d 528, 173 N.Y.S.2d 27 (1958).

and to act with diligence to discover critical facts. *See Burnett v. Grattan*, 468 U.S. 42, 59 (1984); *Tomanio*, 446 U.S. at 488; *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978).[7]

The instant case is thus nothing more than a mundane statute of limitations case resting on the application of New York state tolling principles, and the instant petition nothing more than a request for this Court to review the construction of a state law agreed upon by the two lower federal courts. This is a task which this Court has repeatedly emphasized it is disinclined to perform. *Runyon v. McCrary*, 427 U.S. 160, 181 (1976) and cases there cited. In numerous comparable situations where, as here, a "federal right has depended upon the interpretation of state law, '[this] Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred.' " *Id.* (quoting *Bishop v. Wood*, 426 U.S. 341, 346 & n.10 (1976));[8] *accord Chardon v. Fumero Soto*, 462 U.S. 650, 654-55 & n.5 (1983); *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960); *General Box Co. v. United States*, 351 U.S. 159, 165 (1956); *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 630 (1946); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); *see also Butner v. United States*, 440 U.S. 48, 58 (1979); *Gooding v. Wilson*, 405 U.S. 518, 524 (1972); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967). Moreover, this Court's deference to such lower court determinations regarding state law "render[s] unnecessary review of their decisions in this respect." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) (quoting *Cort v. Ash*, 422 U.S. 66, 72-73 n.6 (1975)).

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[7] These rules are also fully consistent with federal tolling policies. *See, e.g., Hobson v. Wilson*, 737 F.2d 1, 35 & n.107 (D.C. Cir. 1984) (statute of limitations begins to run when a "duly diligent" plaintiff would have discovered that which was concealed), *cert. denied*, 470 U.S. 1084 (1985); *Pacyna v. Marsh*, 617 F. Supp. 101, 102 (W.D.N.Y. 1984), *aff'd*, 809 F.2d 792 (2d Cir. 1986), *cert. denied*, 481 U.S. 1048 (1987).

[8] This Court has followed this principle even in situations where, unlike the present case, " 'examination of the state law issue[s] without [lower court] guidance might have justified a different conclusion.' " *Id.*

This case presents no "special and important reasons" within the meaning of Rule 10.1 for this Court to devote its limited resources to reconsider the legally sound determinations of the lower courts.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: New York, New York
November 16, 1990

Respectfully submitted,

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